Lily Rossel a/p Sebastian v Puspham a/p Subramaniam & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A–02–792 OF 2002
ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND NIK HASHIM JJCA
4 MAY 2007

Civil Procedure — Costs — Appeal — Withdrawal — Affidavits in reply and written submissions filed — Whether respondents entitled to costs

The judge had dismissed the appellant's appeal against the decision of the disciplinary board under the Legal Profession Act 1976 dated 19 December 2001 which held that a formal investigation was not necessary and that the appellant's complaints against both the respondents were dismissed. Dissatisfied with the decision of the High Court the appellant filed the notice of appeal to the Court of Appeal. Affidavits in reply in encls 27 and 28 were filed by the respondents respectively. The appellant and the respondents also filed their respective written submissions. On the date of hearing ie 21 March 2005, learned counsel for the appellant applied to withdraw the motion and the appeal proper and prayed for no order as to costs. Both the respondents did not object to the application for withdrawal but insisted on costs of RM2,000 and RM5,000 to be paid by the appellant to each of them for the motion and the appeal respectively. Learned counsel for the appellant objected to the quantum. The issue was whether upon the withdrawal of the motion and the appeal, the respondents were entitled to costs.

Held:

The works in opposing the motion and the appeal had been carried out by both the respondents. For that purpose they had filed their respective affidavits in reply and written submissions. Since there had been no grounds which would induce the court to deprive them of their costs, the court was of the view that the respondents were entitled to costs upon the withdrawal of the matters (see para 10).

[Bahasa Malaysia summary

Hakim telah menolak rayuan perayu terhadap keputusan lembaga tatatertib di bawah Akta Profesyen Undang-Undang 1976 bertarikh 19 Disember 2001 yang memutuskan bahawa tidak perlu adanya satu siasatan rasmi dan bahawa aduan perayu terhadap kedua-dua responden adalah ditolak. Berasa tidak puas hati dengan keputusan Mahkamah Tinggi perayu telah memfailkan notis rayuan ke Mahkamah Rayuan. Afidavit–afidavit jawapan dalam lampiran-lampiran 27 dan 28 telah difailkan oleh responden-responden berkenaan. Perayu dan responden-responden juga telah memfailkan penghujahan bertulis masing-masing. Pada tarikh perbicaraan iaitu 21 March 2005, peguam bijaksana bagi pihak perayu telah memohon untuk

menarik balik usul dan rayuan secara teratur dan memohon tiada perintah berkaitan kos. Kedua-dua responden tidak membantah terhadap permohonan penarikan balik itu tetapi mendesak terhadap kos RM2,000 dan RM5,000 yang perlu dibayar oleh perayu kepada setiap daripada mereka untuk usul dan rayuan berkenaan. Peguam bijaksana bagi pihak perayu membantah terhadap kuantum tersebut. Persoalannya adalah sama ada dengan penarikan balik usul dan rayuan tersebut, responden-responden berhak terhadap kos.

Diputuskan:

Tugas menentang usul dan rayuan telah dilaksanakan oleh kedua-dua responden. Bagi tujuan tersebut mereka telah memfailkan afidavit-afidavit jawapan dan penghujahan bertulis. Memandangkan tiada alasan yang dapat menyebabkan mahkamah tidak membenarkan kos mereka, mahkamah berpendapat bahawa responden-responden berhak terhadap kos sekiranya perkara tersebut ditarik balik (lihat perenggan 10).]

Notes

For cases on appeal on costs, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 1677–1689.

Cases referred to

Gana Muthusamy v Tetuan LM Ong & Co [1998] 3 MLJ 341 (refd)
Gana Muthusamy v Tetuan LM Ong & Co Mahkamah Persekutuan Permohonan Sivil No 08–19 Tahun 1998 (J), unreported (refd)
Lily Rossel a/p Sebastian lwn Pushpam a/p Subramaniam dan satu lagi [2003] 3 MLJ 236 (refd)
United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications [2003] 1 MLJ 465 (refd)

Legislation referred to

Legal Profession Act 1976 s 103E
Rules of the Court of Appeal 1994 r 96
Rules of the Federal Court 1995 r 126

Appeal from: Civil Appeal No 17–01 of 2002 (High Court, Ipoh)

Rabin Devadason (WE Balasingam with him) (WE Balasingam) for the appellant.
Pushpam a/p Subramaniam (Pushpam & Co) for the first respondent.
R Jegatheesa (RJ Esa & Co) for the second respondent.

Nik Hashim JCA (now FCJ, delivering judgment of the court)::

[1] The appellant appealed against the decision delivered by three learned judges: Abdull Hamid Embong J (as he then was), VT Singam J and Balia Yusof Wahi J on 14 September 2002 at the High Court Ipoh (see [2003] 3 MLJ 236) when the

learned judges dismissed the appellant's appeal against the decision of the Disciplinary Board under the Legal Profession Act 1976 ('the LPA') dated 19 December 2001 which held that a formal investigation was not necessary and that the appellant's complaints against both the respondents were dismissed.

[2] Dissatisfied with the decision of the High Court the appellant filed the notice of appeal to the Court of Appeal.

[3] To avoid the appeal from being dismissed, the appellant filed a motion (encl 25 (a)) to have the case transferred to the Federal Court. The motion was supported by an affidavit affirmed by an advocate and solicitor, Williams Ernest Balasingam, who asserted that 'I instructed Messrs N Saraswathy Devi, a firm of solicitors in Kuala Lumpur, to file the notice of appeal at the Federal Court. It was rejected by the clerk at the counter who said that the Federal Court only hears appeals from the Court of Appeal and that it should be filed at the Registry in the Ipoh High Court. Upon the instructions of the clerk at the Federal Court Registry, I filed the notice of appeal to the Court of Appeal at the Registry of the High Court in Ipoh.' Apart from this affidavit, there was nothing to substantiate the assertion.

[4] Affidavits in reply in encls 27 and 28 were filed by the second and first respondents respectively. The appellant and the respondents also filed their respective written submissions.

[5] It is to be noted that s 103E of the LPA clearly provides that any person aggrieved by the decision of the High Court shall have the right to appeal to the Supreme Court, now known as the Federal Court, within one month of the decision of the High Court. As it now stands, appeals against the decision of the High Court under the section lie, not to the Court of Appeal, but directly to the Federal Court. In *Gana Muthusamy v Tetuan LM Ong & Co*, Mahkamah Persekutuan Permohonan Sivil No 08–19 Tahun 1998 (J) dated 3 November 1998 (unreported) the Federal Court (Mohd Eusoff Chin CJ, Wan Adnan Ismail CJ (Malaya) and Dr Zakaria Yatim FCJ) set aside the decision of the Court of Appeal in *Gana Muthusamy v Tetuan LM Ong & Co* [1998] 3 MLJ 341 for lack of jurisdiction to entertain the appeal brought before it.

[6] It must also to be noted that the Court of Appeal has no power to transfer this case to the Federal Court. In *United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and other applications* [2003] 1 MLJ 465 the Federal Court ruled that the Court of Appeal has no power to transfer cases to a higher court, ie the Federal Court. The proper order should have been to strike out the appeal and leave it to the appellant to proceed with the necessary steps as provided by the Rules of the Federal Court 1995, in particular r 126.

[7] On the date of hearing, ie 21 March 2005, learned counsel for the appellant, for obvious reasons, applied to withdraw the motion and the appeal proper and prayed for no order as to costs. Both the respondents did not object to the application for withdrawal but insisted on costs of RM2,000 and RM5,000 to be paid by the

appellant to each of them for the motion and the appeal respectively. Learned counsel for the appellant objected to the quantum.

[8] The issue before us was simple: whether upon the withdrawal of the motion and the appeal, the respondents were entitled to costs.

[9] The application to withdraw the motion and the appeal was granted by the court. Consequently, the court ordered the motion and the appeal to be struck out and in the exercise of our discretion (r 96 of the Rules of the Court of Appeal 1994), we awarded costs to the respondents to be taxed. The deposit was ordered to be shared equally to account of their taxed costs.

[10] The works in opposing the motion and the appeal had been carried out by both the respondents. For that purpose they had filed their respective affidavits in reply and written submissions. Since there had been no grounds which would induce the court to deprive them of their costs, the court was of the view that the respondents were entitled to costs upon the withdrawal of the two matters.

[11] My learned brother Arifin Zakaria JCA (now FCJ) has seen this judgment in draft and has expressed his agreement with it. My learned brother Abdul Kadir Sulaiman FCJ has since retired and has no opportunity to see the judgment in draft.

Order accordingly.

Reported by Loo Lai Mee